Defending the Open Society against its Enemies

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Introduction: One of the six "values-related infringement proceedings" pending at the time of the activation of Article 7(1) TEU in respect of Hungary

On 18 June 2020, in the case of *Commission v Hungary (Transparency of associations)*, the Grand Chamber of the Court of Justice held that Hungarian authorities "introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations" when it adopted a new legislation in 2017 "on the Transparency of Organisations which receive Support from Abroad" (Lex NGO hereinafter). In doing so, Hungarian authorities have violated Article 63 TFEU (free movement of capital) as well as Articles 7 (right to respect for private and family life), 8 (right to the protection of personal data) and 12 (right to freedom of association) of the EU Charter of Fundamental Rights.

The European Commission's infringement action, launched in July 2017, is one of the six "values-related infringement proceedings" in relation to Hungary, as the European Commission highlighted in November 2018 when the Council asked it to report on the situation in the country following the activation of Article 7(1) TEU by the European Parliament in September 2018. The other five infringement actions mentioned concern the targeting of the Central European University (Case C-66/18: judgment pending); the violation of Hungary's legal obligation on the relocation of applicants for international protection (Case C-718/17: judgment issued on 2 April 2020 found Hungary to have failed to fulfil it EU obligations); the adoption of measures violating EU asylum law (Case C-808/18: judgment pending); the criminalisation of activities in support of asylum and residence applications (Case C-821/19: judgment pending); and the discrimination of Roma children in the field of education (action launched in May 2016, but the case is yet to reach the CJ).

The contested measure (Act LXXVI of 2017 on the transparency of foreign funded organisations adopted on 13 June 2017) was ostensibly promulgated to ensure greater transparency of civil society organisations in receipt of "foreign funds" or donations from persons or organisations outside of Hungary. The law obliges detailed annual reporting on accounts by NGOs to a competent court of data relating to their identity, to the financial support reaching or exceeding certain amounts which they receive from natural or legal persons having their place of residence or registered office in another Member State or in a third country and to the identity of such persons. Information on "foreign funded" NGOs would then be published on

a public website, while NGOs were also obliged to indicate on documentation and publicity that they were an “organisation in receipt of support from abroad”.

Underlying this ostensible push for transparency is an essential distrust in the motivations of civil society organisations. More importantly, it creates the semblance in the eyes of Hungarians of foreign support being something which is intrinsically suspicious, possibly illegal, but certainly undermining national interests.

The Judgment in Case C-78/18

On the first point of admissibility, the judgment followed the Opinion of the Advocate General (for analysis of the Opinion see here), and rejected these all claims by the Hungarian government saying that too little time was given to respond to the Commission’s allegations. Importantly, the CJ held that the Commission had not made it more difficult for it to refute its complaints, and accepted that the Commission had, at all relevant stages, duly taken account of the comments made by Hungary in response to the reasoned opinion.

When entering the merits, echoing recent decisions on matters related to judicial independence, the Court repeatedly and rightly took a holistic approach by looking at the “content and combined effects” of the various measures in dispute (see also “seen as whole” and “viewed together”). The Court found that the impugned legislation had treated capital movements in an indirectly discriminatory manner by distinguishing as between capital from Hungary on the one hand and movement from other EU Member States and third countries on the other. It could find no justification in such differentiation of competence to monitor financial support from Hungarian nationals in Hungary and those from and established abroad as they apply differences in treatment which do not correspond with objective differences in situations.

Moreover, Hungarian authorities had done so in an exclusive and “targeted manner” such as to “stigmatis[e] those associations and foundations, those provisions are such as to create a climate of distrust with regard to them, apt to deter natural or legal persons from other Member States or third countries from providing them with financial support.” At multiple junctures in the judgment, the Court highlighted this instigation of a “climate of distrust’ (para 58) and “generalised climate of mistrust” (para 118) and the “dissuasive” (para 116) or “deterrent effect” (para 44 and para 118) of the obligations imposed on exclusively “foreign” (or simply non-Hungarian) financial support to NGOs based in the country. This finding is critical to wider arguments and concerns relating to the health of the civic space in Hungary: the impugned measures are not singular examples of bad law, but rather representative of a broader pattern which has seen “legalistic autocrats” deliberately use legal regulation targeted at reducing or removing any degree of dissent or disagreement in the public and political space.

The Court dismissed the Hungarian government’s argument which sought to justify the measure based on the exceptions within Article 63 TFEU or by an overriding reason in the public interest, highlighting that the state objective of transparency of

donations “although legitimate, cannot justify legislation of a Member State *which is based on a presumption made on principle and applied indiscriminately* (our emphasis) that any financial support paid by a natural or legal person established in another Member State or in a third country and any civil society organisation receiving such financial support are intrinsically liable to jeopardise the political and economic interests of the … Member State and the ability of its institutions to operate free from interference.” (One may add that a country whose institutions are able to operate free from any “interference” from groups of citizens would not be a democracy *tout court.*)

The Court found that even were the argument to be in pursuit of a legitimate aim, no proportionality of the measure could be established as the law seems to be based “not on the existence of a genuine threat but on a presumption made on principle and indiscriminately that financial support that is sent from other Member States or third countries and the civil society organisations receiving such financial support are liable to lead to such a threat.” (para 93)

Simply, the law does not “set out why that objective allegedly justifies the obligations at issue applying indiscriminately to all the organisations which fall within the scope of that law, instead of targeting those which, having regard to their aims and the means at their disposal, are genuinely likely to have a significant influence on public life and public debate.” (para 79) While the Court, correctly in our view, found the targeting of foreign source of funding for NGOs to be unjustifiable, its focus on the *indiscriminate* nature of the law (as between ‘foreign’ funded NGOs) has opened up a potential weakness in reasoning and future application. Where the issue is the *indiscriminate* nature of the application of the law, a potential point of exploitation would be a targeted use of law on civil society organisations “likely to have a significant influence on public life and public debate” – and critically those willing to challenge the weakening constraints on executive power and rule of law backsliding.

On questions related to the infringement of fundamental rights enshrined in the EU Charter of Fundamental Rights, the Court held that Hungary had also failed to fulfil its obligations under Article 7, Article 8 and Article 12 of the Charter. The dissuasive/ deterrent effect of the “systematic obligations” imposed on the associations and foundations falling within the scope of the Lex NGO are such that this legislation must be found as violating the right to freedom of association, the right to respect for private and family life as well as the right to the protection of personal data.

With respect to the Hungarian government’s claim that the public has a right to be informed, the Court of Justice, possibly for the first time, dealt with the concept of public figure one may found in the case law of the European Court of Human Rights. In line with this case law, the Court of Justice held that donating to NGOs above the thresholds laid down in the Lex NGO does not obviously mean donors are public figures who cannot claim the same protection of their private life as private persons. And “even if, given their specific aims, some of those organisations and those persons must be regarded as participating in public life in Hungary, the fact remains that granting such financial support does not entail the exercise of a political role.” (para 131)

The Court concluded that the Lex NGO "cannot be justified by any of the objectives of general interest recognised by the Union which Hungary relied upon". (para 140) This meant that there was not even a need to consider whether Lex NGO met the requirement of proportionality laid down in Article 52(1) of the Charter.

Possible reactions to the judgment

According to EU law, the Hungarian government must now bring its legislation in line with the multiple provisions of EU law it has been violating since 2017. Should it fail to do so, the Commission may start yet another procedure and request the Court to impose financial penalties.

Early public statements by Fidesz politicians are not promising. Justice Minister Judit Varga claimed that the judgment is in fact a victory for her government as it allegedly confirmed that the government's "goal of increasing the transparency of NGO finances" was legitimate. She – and several captured Hungarian media outlets – failed to mention the remaining 95% of the judgment and the *ratio decidendi* holding that Lex NGO had "introduced discriminatory and unjustified restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union". Never one to shy away from promoting tin foil hat conspiracies combined with "the use of anti-Semitic tropes", Orbán has now suggested that the Court of Justice's ruling is due to the hidden liberal and imperialist forces of the Soros-network. This strategy aims to pre-empting any meaningful debate while also preparing the ground for non-compliance or most likely, a façade of compliance with the judgment.

In this respect, six potential scenarios can be outlined from not doing anything *(scenario 1)* – an unlikely option due to the threat of pecuniary sanctions – to full and good faith compliance with the judgment resulting in the total repeal of the Lex NGO *(scenario 6)* – equally unlikely. Between these two most unlikely scenarios, four additional ones may be foreseen:

(scenario 2) The unicameral Hungarian Parliament, where Orbán has a supermajority, may adopt some slight amendments which will not however make any difference as regards for instance the dissuasive/deterrent effect of the current legal framework.

(scenario 3) To save face and not be seen as backtracking under the pressure of the "Western-European headquarters of liberal imperialism", as Orbán put it, the Hungarian government could instruct the captured Hungarian Constitutional Court (HCC hereinafter) to issue a judgment which would give them the cover to do so. That way, Orbán could still pose as a freedom fighter conducting a war against foreign interests while at the same time pretend to be one concerned with the rule of law. Indeed, the HCC has now been sitting on the Lex NGO waiting to be told what to do as soon as the Court of Justice's ruling would come it. All of this of course under the pretext of "constitutional dialogue". As one of us argued earlier, "whereas this justification may sound as persuasive and Europe-friendly, in reality it

is a fake argument, an abuse of a legal concept, so as … to grant more time to the government to harass and intimidate NGOs". Depending on the instructions from Orbán, the HCC may either quash the Lex NGO, partially find it unconstitutional, or, on the contrary, find the Court of Justice's judgment ultra vires… which is our next scenario.

(scenario 4) One cannot exclude that the HCC ends up clearing the Lex NGO completely while finding the Court of Justice's judgment to be objectively arbitrary. The recent judgment of the German Federal Constitutional Court ruling on the European Central Bank's Public Sector Purchase Program could be used as the fig-leaf to cover this additional violation of the EU Treaties.

(scenario 5) A combination of the above scenarios is also plausible: the lawmaker may amend Lex NGO and introduce some cosmetic changes that do not change the detrimental effects of the law in essence, and the case would then be taken up again by the HCC. This is exactly what happened with the case of life imprisonment without the possibility of parole. After a condemning European Court of Human Rights (hereinafter ECtHR) judgment in *Magyar v. Hungary*, the lawmaker introduced a new system of revisiting real life imprisonments that again failed to comply with the Strasbourg test. When the HCC decided to take the case that had been pending before it for years, it rejected in Resolution 3013/2015. (I. 27.) the need to examine the case on the merits on the ground of the Rules of the HCC, according to which a case becomes substantially obsolete if the circumstances giving rise to the complaint ceased to exist in the meanwhile. This case-law may well be invoked when assessing a modified Lex NGO. But of course the fact that a law is amended does not make it automatically constitution- or ECHR-conform – and indeed in a later Strasbourg procedure, *T. P and A. T. v. Hungary* the new life imprisonment rules were also held to be contrary to the ECtHR.

Concluding remarks

From among the above-mentioned possibilities, if any of the scenarios 1, 2, 4 and 5 were followed, the violation of EU law would continue to exist. It is to be hoped therefore that the Commission will not let itself fooled again (deliberately or otherwise), and stand ready to promptly return to the ECJ to sanction non-compliance. Indeed, and as promised and reiterated many times by Ursula von der Leyen, when it comes to the rule of law, there cannot be any compromise.

Thus far the Commission ought to have done better and ought to have done much more. By better we mean systematically applying for interim measures which the Commission has failed to do in this instance and also in the case of the forced expulsion of the Central European University in Budapest. The result: irreparable damage has been done during a period of three years during which Orbán has been able to subject NGOs it does not like to arbitrary, disproportionate and unlawful requirements. By more we mean systematically launching infringement actions rather than expressing 'concerns' every time a new deliberate breach of EU law and in particular its foundational values is committed.

The Commission has failed to do so with altogether six "Article 2 TEU values-related infringement proceedings in relation to Hungary" referred to the Court of Justice since the 2013 Tavares report, that is, *less than one Article 2 TEU related infringement action per year on average* since 2013 with not a single one launched by the VDL Commission to date.

The result of this passivity: "The EU has its first non-democracy as a member: Hungary is now classified as an electoral authoritarian regime."

In addition Poland, another member country abandoning the path of the rule of law, copies the Hungarian tactics silencing those who speak truth to power. The Polish government is now preparing an attack on NGOs along similar lines to Lex NGO.

The Commission is not the only institution to have failed Hungarians. Too many European actors are strong on rhetoric and short on action.

National governments were happy to hide behind the Commission rather than launching their own infringement actions. They were not even bothered to support the Commission before the Court of Justice in the present case, except for Sweden.

The EPP has a lot to answer for in this respect for not enforcing its multiple "red lines", one of which demanded in April 2017 that Orbán respect NGOs.

Whatever the outcome of the Lex NGO case, one can expect the Fidesz government to use the transparency card again "as a pretext to control NGOs or to restrict their ability to carry out their legitimate work". As noted by the Venice Commission in 2017, "this effect would go beyond the legitimate aim of transparency which is alleged to be the only aim" of the Lex NGO. But this won't matter much to Orbán. By the time the Commission returns to the Court, more irreparable damage would have been done and Hungary's transformation into a fully-fledged authoritarian regime further consolidated on the back of generous EU funds.
